U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 21Feb2002

Case Nos: 2001-LHC-1393
2001-LHC-1394

OWCP Nos: 07-145611
07-151892

In the Matter of:

PALADIN DEERING,
Claimant

vs.

INGALLS SHIPBUILDING, INC.
Employer

APPEARANCES:

BILLY W. HILLEREN, ESQ.
On behalf of the Claimant

PAUL B. HOWELL, ESQ.
On behalf of the Employer

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Paladin Deering (Claimant) against Ingalls Shipbuilding, Inc. (Employer), a Self-Insured Corporation.

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Gulfport, Mississippi, on September 21, 2001. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs.[1]

Based upon the stipulations of the parties, the evidence introduced, and the arguments presented, I find as follows:

I. STIPULATIONS

During the course of the hearing the parties stipulated and I find as related to Case Nos. 2001-LHC-1393 and 2002-LHC-1394 (JE-1):

1. Jurisdiction of this claim exists under the LHWCA, 33 U.S.C. §901 et seq.

2. Date of alleged injuries/accidents: December 17, 1996, and January 6, 1999.

3. Employer/Employee relationship existed at the time of the accidents: Yes.

4. Employer was timely advised of the injuries on December 18, 1996, and January 7, 1999, respectively.

5. The Notices of Controversion (LS-207) were timely filed on September 24, 1997, and January 26, 1999, respectively.

6, Date of Informal Conference: March 29, 2000.

7. Average weekly wage at the time of the injury: Disputed.

8. Nature and extent of disability: Disputed

[1] References to the transcript and exhibits are as follows: Transcript - TR. ___; Claimant's Exhibits - CX.___, p.___; Employer's Exhibits - EX. ___, p. ___; Joint Exhibits - JE. ___.

9. Benefits paid:

a) for December 17, 1996 injury:

Temporary total: 9/16/97-9/16/97 at $388.83 per week.
10/13/97-1/4/98 at $388.83 per week
2/18/98-2/25/98 at $388.83 per week

b) for January 6, 1999 injury:

Temporary total: 1/7/99-3/7/99 at $421.89 per week
9/22/99-12/28/99 at 421.89 per week
Temporary partial disability: 12/29/99-2/3/00 at 277.88 per week
2/11/00-2/11/00 at $277.88 per week
2/15/00-8/12/01 at $277.88 per week

10. Permanent disability: Disputed. Percentage: Disputed.

11. Dates of maximum medical improvement: March 17, 1998 and February 14, 2000, respectively.

II. ISSUES

1. Whether the claim for the December 17, 1996 injury is barred by the statute of limitations.

2. Nature and extent of the January 6, 1999 injury.

3. Average weekly wage for both injuries.

4. 8(f) special fund relief.

5. Attorney fees, penalties and interest.

III. STATEMENT OF THE CASE

Summary

Claimant injured his back on December 17, 1996, and again on January 6, 1999. After the first injury, Employer provided suitable alternative employment at its facility. Claimant's condition has waxed and waned ever since the first accident and he has been on and off work intermittently, per his doctor's instruction. After the second injury, however, the parties dispute the nature and extent of Claimant's injuries, whether or not Employer provided suitable alternative employment and whether external suitable alternative

employment exists. The parties also dispute Claimant's average weekly wage for the 52 week periods preceding each injury. Employer asserts that the statute of limitations has run on the claim for additional compensation for the first injury.

Claimant's Testimony

Claimant is a 42 year old man from Gautier, Mississippi. (TR.14). His formal education includes a high school diploma, a welding certificate and completing an introductory course to computers at Gulfcoast College. (TR.18,76). He has worked as a welder throughout his career except for one laborer job. (TR.16).

Claimant began working for Employer as a third class welder in July, 1980, and worked his way up to a first class welder specialist. (TR.16). The welder specialist position involved medium to heavy work and extensive bending and pulling. (TR.17-18). Claimant had to hold certain positions for long periods of time. These positions included bending below the knee and twisting. (TR.18). He also carried a welding line or box that could weigh up to 50 pounds. (TR.17).

Claimant worked full time five days per week at both positions before the first and second accidents. (TR.18-19). In the 52 week period prior to the December 17, 1996 accident, Claimant earned $27,593.60 for 1,732.4 hours of regular work and 160 vacation hours. (CX.9, p.2). He received 48 hours worth of pay as a holiday bonus at New Year's before both accidents. (TR.19). During the 52 weeks prior to January 6, 1999[2], Claimant earned $32,346.20 for 1,680.2 regular work hours, 160 vacation hours, 199 hours of time and a half pay and 102.5 hours of double time pay. (CX.9, p.53). He worked on 246 days during this period. (CX.9, pp.52-134).

Claimant's first injury occurred on December 17, 1996, when he felt something pop in his back as he came out of a bad welding position. Dr. Warfield of Employer's medical facility saw Claimant the next day and diagnosed left hip strain. (TR.20, CX.8, p.3). However, Claimant had injured his lower back. He had a disc herniation with subsequent occasional pain down his left leg. (TR.26). Claimant worked intermittently on a light duty basis until he had to miss work on a sustained basis around September, 1997. (TR.21).

On September 15, 1997, Claimant was interviewed by Sandy Shoemake, an employee of F.A. Richard & Associates, which represents Employer.[3] (CX.24, p.1). In that interview, Claimant described his first accident and his treatment with Dr. Warfield. (CX.24, pp.3,5-6). Claimant was experiencing problems with his left hip at that time. (CX.24, p.5).

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[2]The record shows wages from January 11, 1998, to January 3, 1999. (CX.9, p.53).

[3]Employer is self insured. However, it managed Claimant's case through F.A. Richards & Associates, Inc., which appears as Employer's agent for "insurance carrier" purposes on line 34 of form LS-202. (CX.23, p.1).

By September 18, 1997, Dr. Warfield opined that he could do no more for Claimant and recommended that he see an orthopedist. (CX.8, p.4). Claimant chose Dr. Terrell as his orthopedist. Dr. Terrell has provided regular treatment since September, 1997. (TR.21). Since treating Claimant, Dr. Terrell has returned him to restricted duty several times. (TR.22). Employer could not always provide jobs fitting the restrictions. (TR.23). Generally, the light duty jobs consisted of working in a welding booth. Claimant would weld smaller objects on a table while in an upright position. (TR.24-25). This work involved some leaning over but no bending, kneeling, or twisting. (TR.25-26).

Claimant injured his back a second time on January 6, 1999, when he reached down to lift a copper nickel lid that he was working on. He did not realize the weight of the lid and felt a pop in his back as he tried to lift it. (TR.28). Claimant went to Employer's medical facility for this injury and was told to see Dr. Terrell. Claimant was restricted from working, given pain medication and sent to physical therapy. (TR.29).

Two MRI's showed a bulging disc and herniation. (TR.30). Claimant testified that he goes to physical therapy and performs exercises at home two to three times per week. (TR.31). He has reduced his walking exercises due to increased pain and his leg giving out. (TR.32).

Claimant returned to restricted duty on March 7, 1999. (CX.11, p.48; EX-1). However, he went back off duty on September 22, 1999, because Employer could not provide suitable work to meet his restrictions. (TR.33). In December, 1999, Claimant's leg gave out on him completely and the doctor removed Claimant from all work. (TR.34). However, Employer reduced his benefits to partial disability beginning December 19, 1999, based on a labor market survey in which Tommy Sanders established a $216.00 per week wage earning capacity. (EX.,19, p.3). Claimant returned to work in February, 2000, but complained that the duties did not fit his restrictions. (TR.35). He described the work as "the same thing" but complained that it involved downhand welding with continued work below the knee level. Claimant returned to his doctor who increased the work restrictions. (TR.36). At that time, Employer could not provide employment that met the new restrictions. (TR.37).

Claimant admitted that he is not totally disabled and testified that he wants to return to work. (TR.43,78). He believes that he may be able to perform table or bench welding. (TR.78,85). Claimant filed an internal placement application with Employer on February 22, 2000. (TR.44; CX.21, p.1). Claimant testified that he had been willing to do whatever was available within his restrictions but Employer never offered him a position based on the internal placement application. (TR.45). Claimant applied for positions with other employers, including those Tommy Sanders had identified in December, 1999, on September 4, 5, 6, and 10, 2001, but was unsuccessful in attaining a position that met his restrictions. (TR.46-56,89; CX.21, pp.2-3). He had shown all prospective employers his work restrictions when applying. (TR.73). Five of the fourteen potential employers were identified by Employer. (TR.69). Claimant explained that he had not pursued the leads from Tommy Sanders until September, 2001, because he had been medically and mentally unable to pursue the job leads at the time he received them. (TR.71). Claimant also testified that

he was not applying for positions the week of this trial because he lacked funds and transportation. (TR.72,98). However, Claimant possesses a cell phone which he said a friend prepays minutes for. (TR.99). Claimant owns a '91 Camero that he used to get to trial. (TR.100).

Claimant testified that he could not perform the Pinkerton Security position because it might require him to stop an individual, which he thought he could not do. (TR.47). He also denied the ability to use a key board to perform basic computer functions. (TR.47-48). Claimant also alleged that the required frequent sitting, standing and walking fell outside of his work restrictions. (TR.49). Claimant did not discuss the specifics of these duty requirements with Pinkerton's representative. (TR.50). Claimant was unable to find American Citadel Security and believed they were out of business. (TR.52).

A gas station told Claimant that their cashier positions required "an employee to be 100 percent" and that it "Require[d] more than [Claimant was] able to perform." (TR.54). A security company had no openings and a motel had only housekeeping openings. (TR.55).

Employer requested Claimant meet with Melinda Wiley on August 10, 2001, for placement on August 13. (TR.37,41,78). At trial, Claimant testified that the restrictions Wiley had were not the same as those his doctor had given him. (TR.37). He did not go to the job Wiley had arranged for him to see what duties it entailed. (TR.89). However, Claimant testified at trial that Employer tried to put him "back in [his] full position welding". He went to Dr. Terrell's office where the nurse gave Claimant new restrictions which he returned to Wiley. Claimant believed that the nurse conferred with the doctor. (TR.40). He told the nurse that the work restrictions he had were different from those for the position that Wiley was offering him and that the position was a welding position. (TR.87,88). He did not tell the nurse that he could not do the job. (TR.87). However, he was unaware that the position Employer was prepared to offer was a bench welding position and did not tell the nurse that the prospective position involved bench welding. (TR.88). When he saw the nurse, no physical examination was conducted. (TR.85). On cross examination, Claimant revealed that when he went to see Wiley in August, he possessed a copy of a deposition given by Dr. Terrell in which he had liberalized Claimant's physical working restrictions. (TR.81). Claimant was aware of these changes when he saw Wiley. (TR.82). However, he did not mention these changes to Dr. Terrell's nurse. (TR.86-87). He testified at trial that he was not aware that Wiley had a copy of the same deposition. (TR.83). Wiley never called Claimant to return to work thereafter. (TR.42).

Testimony of Melinda Wiley

Wiley is Employer's employee relations representative. She is responsible for assisting injured employees to return to work after they have received permanent working restrictions. (TR.103). Employer's temporary light duty program returns employees to work until they either return to their previous employment or go into a return to work program that provides positions that meet permanently disabled workers' restriction requirements. (TR.104). This return to work program attempts to return workers to positions in their craft so that they can maintain their seniority and other benefits. (TR.105). Workers are required to sign a form that instructs workers to call Wiley if a supervisor makes them work outside of their

restrictions. Wiley never received any such call from Claimant. Rather, he went to Dr. Terrell with any such problems. Dr. Terrell, in turn, discussed these complaints with Wiley. (Tr.106).

Wiley provided positions that met Claimant's limitations whenever possible. (TR.106). Such positions were as permanent as any other workers and Claimant maintained his seniority. If Claimant could not be placed, he was placed on medical leave and asked to file a transfer application in order to look for other internal positions for him. (TR.107). Claimant had advised Wiley that he felt he could do table top welding. (TR.112).

The position Employer was going to offer Claimant in August, 2001, was in the fabrication shop at a welding table. (TR.108,112). The table would have been approximately 45 inches off the floor. (TR.108). Overhead cranes were available to move materials so that Claimant would not have to lift anything too heavy. (TR.109). Wiley used the restrictions from Dr. Terrell's deposition to identify this position. (TR.110). Claimant would have received the regular wage for a first class welder specialist, which is more than he had earned at the time of his injuries. (TR.112). However, Wiley never got the opportunity to talk to Claimant about the job. (TR.112).

According to Wiley, Claimant became hostile at their August 10, 2001 meeting when she showed him a copy of Dr. Terrell's deposition with the new restrictions which she had used. (TR.109-110). Claimant averred that the restrictions were not his and requested that Wiley call his attorney. Wiley explained that she is unable to speak to attorneys in her position with Employer and suggested that Claimant call his attorney. (TR.110). Claimant left angry after this meeting and returned later the same afternoon with new restrictions from Dr. Terrell that differed from those he had given at his deposition. (TR.111). Employer has not been able to provide a position meeting those restrictions since that time. (TR.116).

Dr. Robert Terrell

Dr. Terrell is a certified family practitioner who limits his practice to office orthopedics. He has practiced office orthopedics since 1988 except for two years when he worked as a primary care physician. (CX.12, pp.4-5,83-84).

Dr. Terrell began treating Claimant in September, 1997. (CX.12, pp.5-6). Claimant had continued working at his job after the first back injury because it involved a lot of standing which did not aggravate his symptoms. Claimant sought treatment from Dr. Terrell after beginning work on another job that required bending which aggravated his back condition. (CX.12, p.6). Initial physical examination showed reduced forward flexion but no neurological problems. (CX.12, p.7;CX.11, p.3).

An MRI taken on September 22, 1997, showed a left parasagittal disc herniation at L5-S1 and a bulging disc at L4-5 causing narrowing of the neuroforamina. (CX.12, pp.7-8; CX.11, p.8). At following visits, Claimant complained of left leg pain and had developed a positive straight leg raising test, indicating neural irritation. (CX.12, p.9; CX.11, p.13).

On March 17, 1998, Dr. Terrell made Claimant's working restrictions for the first injury permanent. (CX.12, p.14, CX.11, p.34). These restrictions included no prolonged sitting and bending or working at or below the knee height, no working in confined spaces, no sweeping or mopping and no lifting over 35 pounds. (CX.12, p.15; CX.11, p.34). Dr. Terrell suggested that Claimant continue welding in a position that allowed frequent body changes. (CX.11, p.34).

Dr. Terrell saw Claimant the day after his January 6, 1999 accident. (CX.12, p.19). This accident affected the same area of his back as the December 17, 1996 accident. (CX.12, p.20). Physical examination revealed some muscle tenderness and some restricted range of motion. Straight leg raising test was positive indicating nerve root irritation. Dr. Terrell also found lost strength of dorsiflexion, the first neurologic sign he had found in Claimant. (CX.12, p.21). Dr. Terrell could not determine whether Claimant had re-injured himself or had suffered a new injury because the injury was in the same place as the original injury. (CX.12, p.20). A second MRI performed on May 29, 2000, showed disc herniations at L5-S1 and L4-5. (CX.11, p.74; CX.12, p.40-41). In a June 28, 2000 letter, Dr. Terrell attributed the herniation at L4-5 to the second accident because it had been just a bulge previously. (CX.11, pp.80-81). Dr. Terrell believed that Claimant's second injury combined with and contributed to his first injury, making him materially and substantially more disabled than he would have been as a result of the first injury alone. (CX.12, p.63). Dr. Terrell removed Claimant from all duty from January 7, 1999, until March 8, 1999. At that time, Dr. Terrell limited Claimant to restricted duty in the welding booth. (CX.11, pp.43-48). He returned Claimant to his permanent work restrictions from the first injury on March 12, 1999.[4] (CX.11, p.50).

Dr. Terrell adjusted Claimant's restrictions on September 22, 1999, because Employer had removed Claimant from bench welding work and Claimant was working below the knee and hurting. (CX.11, pp.51,53). The new restrictions limited Claimant to sedentary work with no bending, no crawling, no working below the knee, no prolonged sitting, no working in confined spaces and no sweeping or moppong. (CX.11, p.53).

When Dr. Terrell saw Claimant on December 30, 1999, Claimant had not been working because Employer did not have work for him and had closed over the holidays. (CX.12, p.31). Claimant's symptoms had worsened, however, especially in his leg. (CX.11, p.57). Dr. Terrell removed him from work until an FCE had been performed and returned him to light duty on February 4, 2000. (CX.11, pp.57-64). These restrictions included a 35 pound lifting limit with limited bending or stooping, limited crawling, squatting or kneeling, limited ladder climbing, limited working below the knee, no prolonged sitting, and limited working in confined spaces if squatting or bending were required. (CX.11, p.64). Dr. Terrell changed these restrictions on February 14, 2000, to a 20 pound weight lifting limit and no bending, stooping, crawling, overhead work, working below the knee, prolonged sitting or working in small confined spaces. (CX.11, p.67).

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[4] At his deposition, Dr. Terrell referred to the January 8, 1998 restrictions. However, the weight lifting restriction on that date was 25 pounds and not the 35 pound limit given on March 17, 1998.(CX.11, pp.27,34).

On January 25, 2000, an FCE by Doug Roll showed decreased trunk, lumbar and straight leg raise range of motion; decreased left hip flexion; generalized weakness of the trunk musculature and decreased sensation in the distribution of L5-S1 dermatomes. However, reflexes were symmetric. Claimant demonstrated a poor understanding of how to use safe and proper body mechanics, which, according to Dr. Terrell, is normal for most individuals. (CX.12, p.34). Roll concluded Claimant could perform light duty work with some lifting, carrying, and pushing up to 20 pounds on an occasional basis and 10 pounds on a frequent basis. (CX.12, p.35; CX.14, p.2).

When Dr. Terrell saw Claimant on April 11, 2000, he suffered from episodic pain. (CX.12, p.38). Dr. Terrell testified that at this point, he had to prescribe narcotic medication regularly to treat pain symptoms. Claimant never abused this medication. (CX.12, p.39).

Throughout treatment with Dr. Terrell, Claimant's condition waxed and waned but remained stable. (CX.12, p.48). By the time of Dr. Terrell's deposition, Claimant's neurologic abnormalities and radicular problems had resolved. (CX.12, p.49). Dr. Terrell predicted that Claimant could either develop persistent radicular symptoms that could possibly require surgery or continue experiencing waxing and waning pain. (CX.12, pp.74-75). Under the first scenario, however, surgery might not result in retaining Claimant's ability to work. (CX.12, p.75).

When Claimant had reached MMI for the second injury on February 14, 2000, Dr. Terrell had limited Claimant's work restrictions to no bending, stooping, crawling or working overhead. However, Dr. Terrell testified at his deposition that in hindsight, knowing that Claimant did not suffer radiculopathy, he would have restricted Claimant to limited, rather than no bending, stooping, crawling, squatting, overhead work and similar activities. (CX.11, p.67; CX.12, pp.52-53). Dr. Terrell also testified that in hindsight he would have limited Claimant to lifting 25-30 pounds rather than just 20 pounds. (CX.12, p.53). Dr. Terrell had continued the February 14, 2000 restrictions until the May 1, 2001 deposition. (CX.12, p.65).

At his deposition, Dr. Terrell testified that Claimant could work eight hour days or full time. (CX.12, p.53). He testified that Claimant cannot work below the knee for more than ten minutes at a time nor sit for prolonged periods of time. (CX.12, p.54). Dr. Terrell envisioned sitting for 15 to 25 minutes and walking or moving around before sitting down again. (CX.12, p.55). Dr. Terrell testified that the specific time frames for sitting and needing to walk around depend on the circumstance but that the situation should slowly improve over time. (CX.12, pp.56-57). He also prescribed a 1-2 hour limit on prolonged standing in one place. (CX.12, pp.71-73). Dr. Terrell expected Claimant to be willing to work with some minor discomfort but did not want the pain to get too bad. (CX.12, pp.57-58).

Dr. Terrell testified that if Claimant returns to work with the liberalized restrictions he recommended at the deposition his symptoms could worsen. Dr. Terrell was mainly concerned about possible leg symptoms. (CX.12, p.67). At the time of the deposition Claimant continued to need pain medication. (CX.12, p.66). Dr. Terrell testified that limitations on stooping and bending would depend on the type of

jobs Claimant would be assigned. (CX.12, pp.67-68). He could not establish a specific limit on bending because it depends on the job assigned and the amount of intradiscal pressure but testified that Claimant does better in positions where less bending is involved, such as working on fire extinguishers at a bench or at the welding booth. (CX.12, p.69).

In determining whether a position is suitable for Claimant, Dr. Terrell explained that the issue is whether the metastable condition of his back is exacerbated and whether symptoms are aggravated. However, Dr. Terrell expected Claimant to be willing to work with some minor discomfort, as long as it does not become too severe. (CX.12, pp.57-58). Positions where Claimant can remain upright in his back most of the time are best for claimant, such as working at a welding booth. (CX.12, p.69). Dr. Terrell was concerned that sweeping or mopping would lead to forward bending at the waist, loading the back. He didn't want Claimant to bend for long periods of time. (CX.12, p.73). However, if a long broom were provided, allowing Claimant to stand upright, Dr. Terrell would object less. Dr. Terrell doubted such an ideal situation would exist. (CX.12, p.74). Dr. Terrell agreed that Claimant can perform the every day duties of a security or gate guard, as long as he does not have to confront anyone. (CX.12, pp.58-59). Making rounds every thirty minutes would be within Claimant's restrictions. Dr. Terrell was concerned that work in a convenience store as a cashier might involve too much standing but testified that a high stool could be used to compensate. He also expressed concern over the amount of weight lifting required in restocking shelves but opined that Claimant could occasionally lift 25 to 30 pounds. (CX.12, p.59). Dr. Terrell testified that a desk clerk position would be acceptable as long as Claimant could sit and stand. (CX.12, p.62).

From February 14, 2000, to the time of his deposition on May 1, 2001, Dr. Terrell placed Claimant on the same work restrictions. (CX.12, p.64). These restrictions limited Claimant to no bending, stooping, crawling, squatting, kneeling, working overhead, working below knee level or prolonged sitting. These restrictions also prohibited Claimant from working in small confined spaces. (CX.11, p.67). Dr. Terrell revised these restrictions at his deposition. The restrictions Claimant returned to Wiley on August 10, 2001, were for light duty and limited him to lifting no more than 20 pounds with limited bending, stooping, crawling, squatting, and kneeling. They limited Claimant to working overhead or below knee height for no more than five minutes and no prolonged sitting or working in small confined spaces. (CX.11, p.98). Dr. Terrell returned Claimant to the "usual restrictions" on August 28, 2001. (CX.11, p.99).[5]

Dr. James West

Dr. West examined Claimant two times for Employer. He examined Claimant for the first injury on March 16, 1998, and the second injury on July 10, 2000.

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[5]Throughout his notes, Dr. Terrell refers to "the usual/permanent" restrictions and the like. On January 2, 2001, he referred to "the current work restrictions which are his usual permanent restrictions." After his May 1, 2001 deposition, Dr. Terrell made no note of altering Claimant's work restrictions. On June 5, 2001, he wrote "We will continue him on his current work restrictions" in his notes and wrote, "continue permanent work restriction" on the restriction form. (CX.11, pp. 94-95). On July 31, 2001, Dr. Terrell wrote "usual permanent restriction" . (CX.11, p.97).

At the March 16, 1998 examination, Dr. West diagnosed mild degenerative disc disease and a disc herniation at L-5-S1. He assigned a 5% impairment based on AMA Guidelines and restricted Claimant to medium to heavy/medium work with occasional lifting of 40 to 50 pounds and frequent lifting of 20 pounds. (EX.27, p.1).

Dr. West examined Claimant for his second accident on July 10, 2000. He diagnosed a degenerative disc lumbar herniation. He observed a left herniation at L5-S1 and degenerative changes at 4-5.[6] Dr. West stated that it was impossible at that time to determine whether Claimant had suffered an aggravation of his previous injury or a new injury but opined that it was an aggravation. He opined that Claimant could return to restricted duty according to the abilities outlined in the functional capacities evaluation. (EX.27, pp.2-3).

Tommy Sanders

Sanders is a vocational consultant who evaluated Claimant's employability for Employer. (EX.29, p.1). Sanders interviewed Claimant on December 16, 1999, and conducted several labor market surveys. (EX.29, p.4). On December 29, 1999, Employer reduced Claimant's benefits from temporary total disability benefits to temporary partial benefits based on a labor market survey in which Sanders established Claimant's wage earning capacity at $216.00 per week. (EX.19, p. 13).

At the December 16, 1999 meeting, Claimant expressed a strong desire to continue working for Employer. However, Employer had no work suiting his permanent restrictions available at that time. Claimant possessed a valid drivers license and transportation. Claimant walked one to one and a half miles per week and read the newspaper, magazines and the bible as well as watching television. (EX.29, p.4). Claimant's formal education consisted of a high school diploma, employer sponsored courses in Introduction to Computers, Blueprint Reading and Principles of Management and one year of welding training at a community college. Claimant had used the "hunt and peck" method to perform data entry for his supervisor position. (CX.29, p.5).

Sanders had reviewed Claimant's medical record and understood Claimant had a herniated disc at L4-5. He also cited Dr. Terrell's September 22, 1999 restrictions which included a 10 pound lifting limit with no bending, stooping, crawling, prolonged sitting or working below the knee. Claimant also was not supposed to work in confined to tight spaces and should not perform mopping or sweeping. Claimant agreed to these limitations at their interview, noting that he could perform limited bending but could not bend below knee level. (CX.29, p.5).

[6] I note that Dr. West's observation of a degenerative change at L4-5 differs from Dr. Terrell's observation that L4-5 became a full blown herniation after the second accident.

On December 21, 1999, Sanders informed Claimant of three full time positions and one part time position that were available at that time. Sanders had already contacted these prospective employers, informing them of Claimant's age, education, work history and medical restrictions. (EX.29, p.2). Wages ranged from $5.15 to $5.90 for 32 to 40 hour per week positions. The part time position paid $6.54 per hour for a 16 hour week. (EX.29, pp.2-3).

Pinkerton's Security was hiring three full time gate guards and paid $5.90 per hour. One position involved logging individuals in and out at a guard shack with no walking of rounds. Another gate guard position involved walking rounds when employees were not working. These positions involved negligible weight lifting with occasional standing/walking and frequent sitting/handling. Individuals could sit, stand or walk as needed. (EX.29, p.2).

Days Inn and Motel 6 was hiring desk clerk trainees at $5.15 per hour for 32 to 40 hours per week. Duties included greeting customers, offering room rates, accepting payment, making reservations, maintaining records of vacancies, completing end of shift reports, issuing keys, and assigning rooms. Lifting was negligible with no repetitive low back activity. (EX.29, pp.2-3).

American Citadel had one part time guard position at $6.54 per hour for over 16 hours per week with the possibility of advancement to full time. Duties included monitoring a parking lot camera, logging individuals, completing incident reports and 10-15 minute rounds. Physical requirements also included occasional lifting of up to 3 pounds with the ability to alternately sit, stand and walk. (EX.29, p.3).

In April, 2000, Sanders performed a retroactive labor market survey for on or around February 15, 2000. In performing this survey, Sanders considered Dr. Terrell's February 14, 2000 restrictions and the restrictions from the January 25, 2000 FCE.[7] (EX.29, p.10). Using Dr. Terrell's restrictions, Sanders noted that Pinkerton's Security had hired gate guards working 20 to 40 hours per week making $5.75 per hour. Day Detectives had hired a 32 to 40 hour per week security guard at $5.75 per hour. Gulf Coast Security had hired security guards making $5.50 per hour working 20 to 40 hours per week. Using the FCE restrictions, Sanders noted that Chevron Convenience Store generally hires three to five full and part time cashiers each month earning $5.25 per hour. Coastal energy had hired fuel booth cashiers at $5.25 per hour for 32 to 40 hours per week. Pinkerton's Security had hired security guards at $5.50 per hour for 20 to 40 hours per week. (EX.29, p.14).

[7]Sanders noted the FCE restrictions to include a 25 pound lifting limit for floor to thigh and from shoulder height to overhead with a 30 pound limit for 12 inches from the floor to thigh and thigh to shoulder. (EX.29, p.10). These restrictions were correctly drawn from the FCE but are slightly different from those also correctly cited from the FCE by Dr. Terrell above. Sanders correctly cited Dr. Terrell's February 14, 2000 restrictions.

In the April, 2000 survey Sanders also identified contemporary positions. Using Dr. Terrell's restrictions, Sanders identified three potential employers. Swetman Security had two full time positions for gate guards paying $5.67 per hour. Duties included working the gate and checking construction workers in and out. They involved negligible lifting with occasional standing/walking and frequent sitting/handling. One could also alternately sit, stand and walk. (EX.29, p.11).

Pinkerton's Security had two full time security guard positions paying $5.90 per hour. One position required making a 30 minute round three to four times per shift and negligible lifting. The rest of the time, one could sit, stand or walk at will. (EX.29, p.11).

Heilig Meyers Furniture had a full time customer service representative trainee position paying $6.00 per hour. Duties included contacting past due accounts for collection purposes, accepting credit and term lease applications, maintaining records of payment, answering the phone, assisting customers, verifying and balancing the cash drawer and other clerical duties such as filing and submitting late notices. This position required occasionally lifting up to ten pounds and allowed for alternately sitting, standing and walking. (EX.29, p.11).

Using the FCE restrictions, Sanders noted the Pinkerton's Security positions would also fit the FCE restrictions. Sanders also identified a Texaco convenience store with positions for three cashiers at $5.15 per hour or $5.40 per hour for the midnight shift for 20 to 38 hours per week. Duties included operating the cash register, accepting payment for purchases, complete end of shift report, stock cooler, mob, sweep, empty trash, and picking up parking lot. This position involved occasional bending, stooping, squatting/kneeling, and lifting 5 to 10 pounds and allowed for alternate sitting, standing and walking. (EX.29, pp.11-12). Exxon was accepting applications for full and part time cashiers paying $6.00 per hour. Duties included greeting customers, operating cash register, completing end of shift report, stocking cooler and front shelves and sweeping and mopping once per shift. This position involved occasionally lifting 5 to 18 pounds and occasional sitting with frequent standing, handling and occasional bending/stooping. Employers contacted for positions identified using the FCE restrictions were receptive to considering Claimant even with Dr. Terrell's requirements of no bending, stooping, crawling, overhead work, working below the knee or prolonged sitting. (EX.29, p.12).

On August 9, 2001, Sanders performed another labor market survey in which he used the revised restrictions from Dr. Terrell's deposition. As Sanders understood them, these restrictions included limited bending, stooping, squatting, crawling, kneeling, lifting 25 to 35 pounds, work activity below knee height limited to 10 minutes at a time and from 15 to 30 minutes sitting without moving about. (EX.29, p.16).

Chevron convenience store was accepting applications for full and part time cashiers at $5.50 per hour. Duties included greeting customers, itemizing purchases, operating the cash register, completing shift reports, sweeping and mopping once per shift, re-stocking coolers, straightening shelves, emptying trash and

picking up trash in the parking lot. Occasional lifting of 5 to 18 pounds was required with occasional pushing and pulling of three pounds and occasional sitting, frequent standing/walking and occasional bending/stooping. (EX.29, p.17).

Country Inn Suites was accepting applications for one full time week night auditor trainee paying an entry wage of $6.00 per hour. Duties included verifying and balancing entries and records of financial transactions reported by various departments during the day, utilizing computer to register guests, assigning rooms, issuing keys, accepting payment, answering the phone and taking messages and reservations. This position involved occasional lifting of three pounds with the ability to alternately sit, stand and walk. Training was provided. (EX.29, p.17).

Magnolia Security was hiring four full time and part time security guards at $5.50 to $5.75 per hour. Duties varied from site to site but employees had to be able to perform foot and vehicle patrols. Prospective employees were also required to pass a background check and have a drivers license and telephone or pager. Duties also included maintaining a log book and occasional lifting 2 to 3 pounds. Employees could alternately sit, stand, and walk and degree of activities depended on the job site. (EX.29, p.17).

During the period from February to April, 2001, Country Inn and Suites had hired one desk clerk/night auditor, Pinkerton's Security had hired one security guard and Swetman Security had hired seven gate guards. (EX.29, p.17).

On August 17, 2001, Sanders performed a labor market survey considering Dr. Terrell's August 10, 2001 work restrictions. These restrictions included limited bending, crawling, squatting and kneeling with no more than five minutes of overhead work, a 20 pound weight lifting limit, and a maximum limit of less than five minutes on working work below knee level. Claimant was also restricted from working in small confined spaces that would require bending, squatting and crawling, etc. at all and no prolonged sitting for more than 20 to 30 minutes. (EX.29, p.21).

American Citadel was accepting applications for a gate guard paying $7.50 per hour for a 40 hour week. Duties included checking trucks in and out of a plant and data entry to input information about the truck deliveries. Training was provided and the position allowed for alternate sitting, standing and walking. The position involved no repetitive low back activity, overhead work, crawling, squatting or kneeling. (EX.29, p.21).

Pinkerton's Security had a security guard position paying $5.90 for a 38 hour week. Duties included making 20 to 25 minute rounds in a golf cart. The remainder of the time allowed for alternate sitting, standing and walking. The position involved occasional lifting two pounds and no frequent low back activity, overhead work, crawling, squatting, or kneeling. Availability to work all shifts was required. (EX.29, p.22).

Circle K had two full time cashier positions paying $5.50 per hour at first and increasing to $5.75 per hour after 30 days of employment. Duties included operating a cash register, itemizing purchases, accepting payment, completing shift reports, placing money in a safe, re-stocking coolers and straightening shelves. The position also required sweeping and mopping once per shift, filling ice buckets, emptying trash and picking up the parking lot. A stool allowed for alternate sitting, standing and walking and training was provided. This position required occasional lifting and carrying up to 18 pounds and pushing and pulling up to 5 pounds as well as occasional bending and stooping and frequent standing, walking and handling. Stocking required 10 to 20 minutes and could be completed intermittently throughout an 8 hour shift. The cleaning duties could also be performed intermittently throughout a shift.

On September 7, 2001, Sanders reviewed his labor market surveys from August 9 and 17, 2001 using Dr. Terrell's August 10, 2001 restrictions. These restrictions included a 20 pound lifting limit, limited bending, stooping, crawling, squatting and kneeling with a less than five minute limit on working overhead and below the knee. Sanders stated that these restrictions were used in identifying the August 17 positions. He noted that as re-stocking coolers and cleaning duties could be performed intermittently throughout a shift, limits on activities such as bending, squatting, and working below the knee could be limited to under five minute intervals. (EX.29, p.25). Though the August 9 survey used different restrictions, Sanders believed the positions identified could fit the August 10 restrictions. He noted the ability to perform certain duties intermittently. (EX.29, p.26).

On September 13, 2001, Sanders had reviewed Claimant's worksheet showing his job search. Sanders noted that Claimant had limited his search chronologically to early September, 2001. He also noted that many of the positions Claimant applied for were outside of his work restrictions. Of the positions Claimant applied for that Sanders had identified, Claimant had noted that American Citadel had gone out of business. Sanders explained that American Citadel was still in business but had reduced it's operation due to the closing of one of its major client's facilities. (EX.29, p.27). Sanders opined that Claimant had not performed a diligent job search, citing the limited time frame within which the search had been conducted, the fact that many of the positions applied for exceeded Claimant's restrictions, and the fact that Claimant had presented prospective employers with a copy of his restrictions and asked them to sign his work search form. (EX.29, p.28).

DOL Record

A Form LS-202 was filed with the Department of Labor (D.O.L.) on September 17, 1997. (CX.23, p.1). On January 12, 1998, Employer sent a copy of Dr. Terrell's December 19, 1997 office notes to the D.O.L. . This note refers to Claimant's disc herniation and discusses restricted duty. (CX.23, p.8; CX.11, p.24). The D.O.L. record also contains a February 17, 1998 letter from Dr. Terrell to Wiley in which Dr. Terrell requests that Claimant be provided with suitable alternative employment within his craft.

The letter indicates continued work restrictions and was received in March, 1998. (CX.23, p.11; CX.11, p.31). Dr. Terrell's office notes of April 16, 1998, were sent to the D.O.L. on May 26, 1998. These notes state that Claimant has "bad days" and "good days", indicating that his condition waxes and wanes. (CX.23, p.13; CX.11, p.36). The present claim was filed on March 6, 2000. (EX.7, p.1).

IV. DISCUSSION

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence, draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 114 S.Ct 2251 (1994), aff'g, 990 F.2d 730 (3rd Cir. 1993).

TIME FOR FILING OF CLAIMS

Employer asserts that Claimant's claim for additional benefits for the December 17, 1996 accident is barred by the Act's statute of limitations.

Section 13(a) pf the Act provides in pertinent part:

> ... the right to compensation for disability ... under this Act shall be barred unless a claim therefor is filed within one year after the injury ... . If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. ... 33 U.S.C. §913(a).

Section 13(a) provides that in cases in which compensation is paid without an award, the right to disability benefits is barred unless a claim is filed within one year of the date of the last voluntary payment. See 33 U.S.C. §913(a); Peterson v. Washington Metro. Area Transit Auth., 17 BRBS 114 (1984). It is well established that an attending physician's report, which indicates the possibility of a continuing disability,

filed within one year after the termination of voluntary payments, may meet the filing requirement of Section 13(a). See Peterson, 17 BRBS 114; Paquin v. General Dynamics/Elec. Boat Div., 4 BRBS 383 (1976). Moreover, the Board has determined that medical reports indicating the requisite disability, which are filed while voluntary payments are being made, may satisfy the Section 13(a) filing requirement. Paquin, 4 BRBS 383. Chong v. Todd Pacific Shipyards Corp., 22 BRBS 242 (1989).

Employer last paid voluntary payments for the 1996 injury on May 18, 1998. (EX. 7). The present claim was filed on March 6, 2000, more than one year following the last voluntary payment of compensation. Therefore, I must review the record to determine whether a medical report by an attending physician was filed within the year following the last voluntary payment to satisfy Section 13(a) of the Act. Claimant asserts the recorded statement he gave to the adjuster (CX. 24) and various attending physician reports filed in the OWCP record (CX. 23) satisfy the Section 13(a) requirement.

A Form LS-202 was filed on September 17, 1997, opening a file with the D.O.L. . This file contains, among other things, copies of several office notes and a letter from Dr. Terrell. A December 19, 1997 office note was sent to the D.O.L. on January 12, 1998, indicating Claimant suffered a disc herniation and was on limited duty. A February 17, 1998 letter in which Dr. Terrell requested suitable alternative employment for Claimant within his craft, indicates continued work restrictions and was entered into the D.O.L. file in March, 1998. An April 16, 1998 note was sent to the D.O.L. on May 16, 1998, showing that Claimant's condition was waxing and waning and was, therefore, continuous.

While the filing requirement has been liberally construed in favor of finding that a claim has been timely filed, to satisfy the Section 13(a) requirement, it must be reasonably inferred from the letter or notice that a claim for compensation is being made. Peterson, 17 BRBS at 116. Under the circumstances of this case, I find that it may not be reasonably inferred from the statements and reports that a claim for compensation is being made. Quite the contrary, during this entire period of time Claimant was being paid either full disability compensation or was earning full wages in the Employer provided suitable alternative employment. The medical reports indicate that Claimant may continue in this position where he earned his regular wage. Further, the DOL vocational consultant found the position suitable for Claimant. (EX. 28). Rather than lead one to infer that a claim for compensation was being filed, following receipt of the medical reports the DOL file was closed. (CX. 23, pp. 15, 65). Even to this day there appears to be no controversy over the nature and extent of Claimant's disability from the 1996 injury. The only issue concerning the 1996 injury concerns the computation of Claimant's average weekly wage. I find the claim for further benefits for the December 17, 1996 injury is barred by the statute of limitations since the medical reports and Claimant's statements were insufficient to constitute the filing of a claim. I find that Claimant has not met the timely filing requirement under Section 13(a) of the Act and his claim related to the December 17, 1996 injury is barred.

NATURE AND EXTENT

The parties have stipulated to the December 17, 1996 and January 6, 1999 injuries and dispute the nature and extent of the January 6, 1999 injury only. Having established work-related injuries, the burden rests with the Claimant to prove the nature and extent of his disability, if any, from those injuries. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1985). A Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 2741(1989); Trask, at 60. Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question of fact based upon the medical evidence of record. Ballestros v. Willamette Western Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395 (1981). The parties have stipulated, and I find, that Claimant reached MMI on February 14, 2000, for the second injury. Dr. Terrell, Claimant's treating physician, assigned work restrictions after he had reached MMI. Dr. West examined Claimant for Employer on July 10, 2000, and recommended restricted duty. Therefore, both examining doctors agree that Claimant has a residual disability and I find Claimant's incapacity to be permanent in nature.

The question of extent of disability is an economic as well as medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). Disability under the LHWCA means an incapacity, as a result of injury, to earn wages which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. §902(10). In order for Claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Economic disability includes both current economic harm and the potential economic harm resulting from the potential result of a present injury on market opportunities in the future. Metropolitan Stevedore Co. v. Rambo (Rambo II), 117 S.Ct. 1953, 1955 (1997). A Claimant will be found to have either no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss (de minimis), a total loss, or a partial loss.

A Claimant who shows he is unable to return to his former employment has established a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Furthermore, a Claimant who establishes an inability to return to his usual employment is entitled to an award of total compensation until the date on which Employer demonstrates the availability of suitable alternative employment. Rinaldi v. General Dynamics Corps., 25 BRBS 128 (1991). The physicians who have examined Claimant have placed limits on the type of duties he can perform. With these restrictions Claimant cannot return to his former employment. I find that Claimant cannot return to his previous employment as a day laborer and has established a prima facie case for total disability.

SUITABLE ALTERNATIVE EMPLOYMENT

The claimant does not have the burden of showing there is no suitable alternative employment available. Rather it is the duty of the employer to prove that suitable alternative employment exists. Shell v. Teledyne Movable Offshore, 14 BRBS 585 (1981); Smith v. Terminal Stevedores, 111 BRBS 635 (1979). The employer must prove the availability of actual identifiable, not theoretical, employment opportunities within the local community. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), rev'g, 5 BRBS 418 (1977); Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980). The specific job opportunities must be of such a nature that the injured employee could reasonably perform them given his age, education, work experience, and physical restrictions. Edwards v. Director, OWCP, 999 F.2d 1374 (9th Cir 1993), cert. denied, 114 S.Ct. 1539 (1994); Turner, 661 F.2d at 1041-1042. The employer need not place the claimant in suitable alternative employment. Trans-State Dredging v. Benefits Review Bd. (Tarner), 731 F.2d 199, 201, 16 BRBS 74, 75 (CRT)(4th Cir. 1984), rev'g, 13 BRBS 53 (1980); Turner, 661 F.2d at 1043, 14 BRBS at 165. However, the employer may meet its burden by providing the suitable alternative employment. Hayes, 930 F.2d at 430.

Employers may rely on the testimony of vocational experts to establish the existence of suitable jobs. Turney v. Bethlehem Steel Corp., 17 BRBS 232, 236 (1985); Southern v. Farmers Export Co., 17 BRBS 64, 66-67 (1985); Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231, 233 (1984); Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691 (1980); Pilkington V. Sun Shipbuilding & Dry Dock Co., 9 BRBS 473; 477-80 (1978). See also Armand v. American Marine Corp., 21 BRBS 305 (1988) (job must be realistically available). The counselors must identify specific available jobs; market surveys are not enough. Campbell v. Lykes Bros. Steamship Co., 15 BRBS 380, 384 (1983); Kimmel v. Sun Shipbuilding & Dry Dock Co., 14 BRBS 412 (1981). See also Williams v. Halter Marine Serv., 19 BRBS 248 (1987) (must be specific, not theoretical, jobs). The trier of fact should also determine the employee's physical and psychological restrictions based on the medical opinions of record and apply them to the specific available jobs identified by the vocational expert. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99, motion for recon. denied, 17 BRBS 160 (1985). To calculate a claimant's wage earning capacity, the trier of fact may average the wages of suitable alternative positions identified. Avondale Industries v. Director, OWCP, 137 F.3rd 326 (5th Cir. 1998).

If the employer has established suitable alternative employment, the employee can nevertheless prevail in his quest to establish total disability if he demonstrates that he tried diligently and was unable to secure employment. Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988). The claimant must establish a reasonable diligence in attempting to secure some type of suitable employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and must establish a willingness to work. Turner, 661 F.2d at 1043.

The Board and those circuits which have spoken on this issue are now in agreement that total disability becomes partial on the earliest date that the employer establishes suitable alternate employment. Palombo v. Dir., OWCP, 937 F.2D 70, 25 BRBS 1 (CRT) (2cd Cir. 1991); Dir., OWCP v. Berkstresser, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990), rev'g 16 BRBS 231 (1984), 22 BRBS 280 (1989); Stevens v. Dir., OWCP, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), rev'g Stevens v. Lockheed Shipbuilding Co., 20 BRBS 155 (1989), cert. denied, 498 U.S. 1073 (1991); Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988); Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986). From the date of maximum medical improvement to the date of suitable alternate employment is shown, the claimant's disability is total. Stevens, 909 F.2d 1256.

Nevertheless, an employer is not prevented from attempting to establish the existence of suitable alternative employment as of the date an injured employee reaches maximum medical improvement or from retroactively establishing that suitable alternative employment existed on the date of maximum medical improvement. Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); Rinaldi, 25 BRBS 128; Jones v. Genco, Inc., 21 BRBS 12 (1988).

In the instant case, Employer presented evidence of both an internal offer for employment and vocational evidence of external positions. Employer asserts that Claimant's benefits should be reduced to partial as of December 30, 1999, based on Sanders' December 21, 1999 labor market survey. To address Claimant's argument that Dr. Terrell removed him from work from December 29, 1999, to February 4, 2000, Employer argues that Sanders' April 17, 2000 labor market survey retroactively established suitable alternative employment availability to February 4, 2000. Employer also argues that all compensation benefits should have been cut off as of August 12, 2001, because of Claimant's failure to accept a modified internal position at its facility.

Since Dr. Terrell removed him from doing any work from December 30, 1999, to February 4, 2000, I find that he could not work during that time. Claimant also argues that Employer's retroactive labor market survey for February 15, 2000, that was issued on April 17, 2000, was insufficiently specific to show suitable alternative employment as of February 15, 2000. I agree. Employer showed the positions that certain employers had filled during that time and the wages paid but failed to show the position duties and that those duties fit Claimant's restrictions.

Restrictions

The record contains several sets of restrictions issued by Dr. Terrell and a set of restrictions from an FCE. As Dr. Terrell has been Claimant's treating physician since September, 1997, and I find Dr. Terrell to be a convincing witness from reading his deposition, I am giving his restrictions more weight. In making this decision, I note that Doug Roll saw Claimant only one time in order to perform the FCE. At his deposition, Dr. Terrell testified that the key issue in determining whether a position fits Claimant's restrictions

is whether his back symptoms are aggravated beyond a reasonable amount. He favored positions where Claimant's back can remain upright and objected to mopping or sweeping because of forward bending at the waist when performing those tasks. However, the record is not clear as to which set of Dr. Terrell's restrictions should be used.

The record establishes that Dr. Terrell kept Claimant on the same permanent restrictions from February 14, 2000, until May 1, 2001, when he altered these restrictions at his deposition. However, Dr. Terrell never noted the adjusted restrictions from this deposition in his notes. He altered Claimant's work restrictions on August 10, 2001, and returned claimant to "usual work restriction" on August 28, 2001. I note that, aside from the weight lifting limit, the differences between the May 1, 2001 and the August 10, 2001 restrictions are almost immaterial. On August 10, 2001, the lifting limit was reduced to 20 pounds from 25-30 pounds. Dr. Terrell gave a 5 minute quantification to the limit on bending, stooping, squatting, crawling, and kneeling. He also reduced the limit on working below knee height from 10 to 5 minutes at a time and raised the limit on sitting without moving from 15-30 minutes to 20-30 minutes. As Dr. Terrell last referred to "the usual restrictions", I find that he intended to apply the latest previous restrictions, which were those of August 10, 2001. In determining whether suitable alternative employment exists, I will apply the August 10, 2001 limitations while taking into account Dr. Terrell's concerns and rationale expressed at his deposition. In making this application, I note that the August 10, 2001 limitations are less restrictive than those of February 14, 2000.

Labor market surveys

In attempting to show availability of suitable alternative employment, Employer presented four labor market surveys by Sanders. Considering Dr. Terrell's concerns and his August 10, 2001 restrictions, I find the following positions that Sanders identified fit Claimant's work restrictions: the Swetman Security gate guard positions at $5.67 per hour, Pinkerton's Security security guard positions at $5.90 per hour, and Heilig Meyers Furniture's costumer service representative trainee position at $6.00 per hour from the April 17, 2000 labor market survey; the Country Inn Suites night auditor trainee and the Magnolia Security guard positions, paying $6.00 and $5.50-5.75 per hour, respectively, from the August 9, 2001 labor market survey; and the Pinkerton's Security guard position, paying $5.90 per hour, from the August 17, 2001 labor market survey. I reject the cashier positions, which required mopping, sweeping, and cleaning up the parking lot because of Dr. Terrell's concern about forward bending and loading the back. I also reject the American Citadel gate guard position because, according to Sanders, American Citadel had reduced its operation due to the closing of a major client's facilities. Employer failed to show the availability of this position.

I did not consider positions identified in the December 21, 1999 survey because Dr. Terrell had removed Claimant from work at that time. However, I have found that the positions identified as of April 17, 2000, did provide suitable alternative employment. Therefore, I find that suitable alternative employment

existed as of April 17, 2000. Averaging the compensation rates for the suitable positions identified, I find that Claimant has an earning capacity of $5.85 per hour or $234.00 per week.

Even though Employer has successfully demonstrated available suitable alternative employment, Claimant may still establish total disability if he shows that he tried diligently and was unable to secure employment. See Hooe, 21 BRBS 258. In this case, Claimant has failed to demonstrate he performed a diligent job search. As Sanders pointed out, Claimant limited his job search to several days in early September, 2001, just days prior to the hearing in this matter. Claimant applied for several positions Sanders had identified long after they had been identified. All of the positions Claimant applied for that had not been identified by Sanders were outside of his work restrictions. Furthermore, Claimant claimed at trial that he had been unable to afford the resources necessary to conduct a job search. However, a friend had provided him with a cell phone and he admitted to driving his own car to trial. Claimant had the resources to conduct a diligent job search. Considering the totality of these facts, I find that Claimant did not perform a diligent job search.

Internal position

Employer asserts that all benefits should have ceased completely as of August 12, 2001, because it offered Claimant an internal position as suitable alternative employment to begin on that date and he failed to accept it. Employer argues that Claimant did not accept its offer because he disputed the restrictions Wiley had used in identifying the offered position and returned to his doctor alleging that Employer wanted to return him to full duty as a welder. Claimant alleges that the job offer was not realistic because it failed to establish the precise nature and duties involved and because Wiley did not explain the duties at the August 10, 2001 meeting. Claimant's attorney disputes Employer's assertion that Claimant mislead his own doctor in alleging that Employer wanted to return him to full duty by stating that, at that time, Claimant had only the version of restrictions from Dr. Terrell's deposition.

I find that whether Claimant falsely told Dr. Terrell that Employer intended to return him to full duty is irrelevant to the outcome. Employer asserted that it intended to place Claimant in a bench welding position. The adjustment to Claimant's restrictions on August 10, 2001, was negligibly different from those given at Dr. Terrell's deposition. Therefore, I find that the welding position identified using the restrictions from Dr. Terrell's deposition would have accommodated the August 10, 2001 restrictions and that it would have constituted suitable alternative employment. However, when Claimant returned the same day with the new restrictions, Wiley told Claimant that she did not have a position available for him. When Claimant appeared on Monday, Wiley did not speak to him. At trial, Wiley testified that Employer did not have a position available for Claimant that fit his restrictions. Therefore, I find that Employer withdrew the offer of a modified welding position and that the position offered for August 12, 2001, cannot be used to show suitable alternative employment.

AVERAGE WEEKLY WAGE

The parties disagree on the issue of average weekly wage for the periods before both the December 17, 1996, and the January 6, 1999 injuries. Since the Statute of Limitations ran before a claim was made for the December 17, 1996 injury, I must determine Claimant's average weekly wage for the 52 week period preceding the January 6, 1999 injury only. Employer asserts that I should use Section 10(c) of the Act in my calculation because Claimant worked a regular 40 hour week during only 22 of the 52 weeks preceding his second injury. I disagree.

Section 10 of the Act sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Orkney v. General Dynamics Corp., 8 BRBS 543 (1978); Barber v. Tri-State Terminals, 3 BRBS 244 (1976), aff'd sub nom. Tri-State Terminals v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Sections 10(a) and 10(b) are the statutory provisions relevant to a determination of an employee's average annual wages where an injured employee's work is permanent and continuous. Duncan-Harrelson Co. v. Director, OWCP, 686 F.2d 1336, 1342 (9th Cir. 1982), vacated in part on other grounds, 462 U.S. 1101 (1983). The computation of average annual earnings must be made pursuant to subsection (c) if subsections (a) or (b) cannot be reasonably and fairly applied. 33 U.S.C. § 910. Section 10(a) applies where an employee "worked in the employment... whether for the same or another employer, during substantially the whole of the year immediately preceding" the injury. 33 U.S.C. § 910(a); Empire United Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); Duncan v. Washington Metro. Area Transit Auth., 24 BRBS 133, 135-136 (1990); Mulcare v. E.C. Ernst, Inc., 18 BRBS 158 (1986). Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year" prior to injury. Empire United Stevedores v. Gatlin, Id.; Duncan-Harrelson Co. v. Director, OWCP, Id.; Duncan v. Washington Metro. Area Transit Auth., Id.; Lozupone v. Lozupone & Sons, 12 BRBS 148, 153 (1979).

When there is insufficient evidence in the record to make a determination of average weekly wage under either subsections (a) or (b), subsection (c) is used. Todd Shipyards Corp. v. Director, OWCP, 545 F.2d 1176, 5 BRBS 23, 25 (9th Cir. 1976), aff'g and remanding in part 1 BRBS 159 (1974); Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 104 (1991); Lobus v. I.T.O. Corp., 24 BRBS 137 (1991); Taylor v. Smith & Kelly Co., 14 BRBS 489 (1981). Subsection (c) is also used whenever subsections (a) and (b) cannot reasonably and fairly be applied and therefore do not yield and average weekly wage that

reflects the claimant's earning capacity at the time of the injury. Empire United Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); Walker v. Washington Metro Area Transit Auth., 793 F.2d 319 (D.C. Cir. 1986), cert, denied, 479 U.S. 1094 (1987); Browder v. Dillingham Ship Repair, 24 BRBS 216, 218 (1991).

The trial record indicates that Claimant worked for Employer full time throughout the period previous to his second injury. He worked 1,680.2 regular hours, 160 vacation hours, 199 hours earning time and a half and 102.5 double time hours or a total of 1,981.7 hours plus vacation pay. In that period, he earned $32,346.20 and worked on 246 days. He had worked for Employer for 16 years. Therefore, I find that Claimant worked for Employer in the same employment during substantially the whole of the year preceding the January 6, 1999 injury and that Claimant's average weekly wage should be calculated pursuant to Section 10(a) of the Act. I find that Claimant's average weekly wage for the 52 week period preceding his second injury was $657.44 per week.[8]

SECTION 8(f)

Employer requests relief from the Special Fund pursuant to Section 8(f) of the Act. Under the "aggravation rule", an employer is usually liable for the claimant's entire resulting disability when an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or condition. Strachan Shipping Co. v. Nash, 782 F.2d 513, 517 (5th Cir. 1986)(*en banc*); Director, OWCP v. General Dynamics Corp., 900 F.2d 506, 508 (2nd Cir. 1990). However, if an employer can prove entitlement to Section 8(f) relief, the Special Fund may assume responsibility for part of the employer's obligation. To obtain Section 8(f) relief when an employee is totally disabled, an employer must show that: 1) the employee had a pre-existing permanent partial disability; 2) this disability was manifest to the employer prior to the subsequent injury; and 3) the subsequent injury alone would not have caused the claimant's total permanent disability. Director, OWCP v. General Dynamics Corp., 982 F2d 790, 793 (2nd Cir. 1992); see Brown and Root, Inc. v. Sain, 162 F.3d 813 (4th Cir. 1998) (previously existing permanent partial disability must contribute to employee's death). When an employee is permanently partially disabled and not totally disabled, the employer must also show that the current permanent partial disability "is materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. §908(f)(1), cited in Two R Drilling Co. v. Director, OWCP, 894 F.2d 748, 750 (5th Cir. 1990). I have found that Claimant is permanently partially disabled.

The purpose of Section 8(f) is to prevent employer discrimination in the hiring of handicapped workers, and to encourage the retention of handicapped workers. Lawson v. Suwanee Fruit and Steamship Co., 336 U.S. 198 (1949); General Dynamics Corp, 982 F.2d at 793. It is also well settled that the provisions of Section 8(f) are to be construed liberally in favor of the employer. Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192 (5th Cir. 1977); Johnson v. Bender Ship Repair, Inc., 8 BRBS 635 (1978).

[8]Total wages of $32,346.20 ÷ 246 days worked x 260 days ÷ 52 weeks = $657.44.

A pre-existing permanent partial disability can be (1) a scheduled loss under Section 8(c) of the Act; (2) an economic disability arising out of a physical infirmity; or (3) a serious physical disability which would motivate a cautious employer to dismiss an employee because of a greatly increased risk of an employment-related accident and compensation liability. C & P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977); General Dynamics Corp., 982 F.2d at 795; Cononetz v. Pacific Fisherman, Inc., 11 BRBS 175 (1979); Johnson v. Brady-Hamilton Stevedoring Co., 11 BRBS 427 (1979). Although the mere fact of a past injury does not establish a disability, the existence of a serious and lasting disability does. Foundation Constructors v. Director, OWCP, 950 F.2d 621 (9th Cir. 1991).

The second requirement for 8(f) relief is that the pre-existing work-related injury is manifest to the employer. Sealand Terminals, Inc. v. Gasparic, 7 F.3d 321, 323 (2nd Cir. 1993). This requirement is not a statutory part of Section 8(f) but has been added by the courts. American Mut. Ins. Co. v. Jones, 426 F.2d 1263 (D.C. Cir. 1970). A pre-existing impairment is manifest if the employer knew or could have discovered the impairment prior to the second injury. Director, OWCP v. General Dynamics Corp., 980 F.2d 74, 80-83 (1st Cir. 1992); Lowry v. Williamette Iron and Steel Co., 11 BRBS 372 (1979). The existence or availability of records showing the impairment is sufficient notice to meet the manifest requirement. Director v. Universal Terminal and Stevedoring Corp., 575 F.2d 452 (3rd Cir. 1978); Eymard & Sons Shipyard v. Smith, 862 F.2d 1220, 1224 (5th Cir. 1989); Todd v. Todd Shipyards Corp., 16 BRBS 163 (1984). Further, virtually any objective evidence of pre-existing permanent partial disability, even evidence which does not indicate the permanence or severity of the disability, will satisfy the manifest requirement, since it could alert the employer to the existence of a permanent partial disability. Lowry, 11 BRBS 372; Director, OWCP v. Berkstresser, 921 F.2d 306, 309 (D.C. Cir. 1990).

Lastly, an employer may obtain 8(f) relief where the subsequent injury alone would not have caused the employee's total permanent disability. General Dynamics Corp., 982 F.2d at 793. Put differently, relief may be obtained where the combination of the worker's pre-existing disability or medical condition and his last employment-related injury result in a greater permanent disability than the worker would have incurred from the last injury alone. Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 1144 (9th Cir. 1991); Director, OWCP v. Newport News and Shipbuilding and Dry Dock Co., 676 F.2d 110 (4th Cir. 1982); Comparsi v. Matson Terminals, Inc., 16 BRBS 429 (1984). The key element is whether the work-related injury, when coupled with the prior disability, materially and substantially aggravated and contributed to the employee's permanent disability.

In the present case, the Solicitor's Office has taken the position that if Claimant has reached maximum medical improvement, then the remaining criteria for entitlement to Special Fund relief have been met. The parties stipulated that Claimant reached MMI for the January 6, 1999 injury on February 14, 2000. Therefore, I find that Employer is entitled to Special Fund relief. The Special Fund will assume benefit payments due after the initial 104 weeks have been paid by Employer.

ORDER

It is hereby ORDERED, JUDGED AND DECREED that:

1) The claim for further benefits for the December 17, 1996 accident is hereby denied.

2) Employer shall pay to Claimant temporary total disability from January 7, 1999, to March 7, 1999, and from September 22, 1999 to February 14, 2000, based on an average weekly wage of $657.44.

3) Employer shall pay to Claimant permanent total disability from February 15, 2000, to April 17, 2000, based on an average weekly wage of $657.44.

4) Employer shall pay Claimant permanent partial disability based on an average weekly wage of $657.44 and a wage earning capacity of $234.00 per week, commencing on April 18, 2000, and continuing for a total of 104 weeks from February 14, 2000.

5) Employer's request for Section 8(f) relief is hereby granted. Following cessation of payments by Employer continuing benefits shall be paid by the Special Fund pursuant to Section 8(f) of the Act.

6) Interest shall be paid on any sums determined due and owing at the rate provided by 28 U.S.C. § 1961.

7) Counsel for Claimant, within 30 days of receipt of this Order, shall submit a fully-documented fee application, a copy of which shall be sent to all opposing counsel who shall have 20 days to respond with objections thereto.

8) Employer shall continue to provide Claimant with medical treatment as his injury may require, pursuant to Section 7 of the Act.

9) All computation of benefits and other calculations which may be provided for in this Decision and Order are subject to verification and adjustment by the District Director.

So ORDERED.

A
LARRY W. PRICE
Administrative Law Judge